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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF NATIONAL ASSOCIATION OF THEATRE OWNERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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BRIEF OF NATIONAL ASSOCIATION OF THEATRE OWNERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Statement of Interest of *Amicus Curiae*

The National Association of Theatre Owners (hereinafter "NATO") is a trade association which represents the interests of motion picture theatres throughout the United States. It has a membership of over 8,000 theatres, representing a capital investment of over $5 billion, located in cities, suburbs, small towns and rural areas across the country. Its members include large "downtown" theatres, neighborhood theatres, shopping center theatres, drive-in theatres and multi-screen theatres, and the motion pictures they show represent an immensely important medium of artistic, cultural, political and social

expression, as well as entertainment, for untold millions of American movie-goers.

NATO and its members are vitally interested in this appeal, which, unfortunately, involves a not atypical example of how this Court's rulings in *Miller* v. *California*, 413 U.S. 15 (1973) and *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), are being misapplied to strike at the very heart of the First Amendment rights of theatre owners to show films of literary, artistic, political or scientific value, regardless of how controversial they may be.

The Appellant-theatre owner in this case was convicted under a state criminal statute, not for displaying hard core pornography, but for showing in Albany, Georgia one of the most critically acclaimed motion pictures of recent years, which had previously played "in the major cities of the nation, the major cities in Georgia, and in many of the cities and towns in Georgia without any contention being publicly made that it was obscene-pornographic".[1] Clearly, if a motion picture such as Carnal Knowledge is deemed obscene and therefore beyond the pale of constitutional protection, then all of NATO's members face a real threat of criminal prosecution whenever they show any film that could conceivably be found objectionable by some local prosecutor and jury. Indeed, the gravity of this danger grows each day as the pattern of local prosecution and harassment that has followed *Miller* becomes increasingly pronounced. Thus, the decision of the Georgia Supreme Court in this case serves to chill—if not freeze—the exercise of First Amendment rights of expression so far as this nation's theatre owners are concerned. The result, in our submission, can only be to lower the quality and diversity of the motion pictures shown across the country and seriously impair one of our most popular and available forums for the free interchange of ideas.

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[1] *Jenkins* v. *Georgia*, 230 Ga. 726, —, 199 S.E.2d 183, 186 (1973) (Gunter, J., dissenting).

All of the parties to this appeal have consented to the filing of this brief pursuant to Rule 42 of the Supreme Court of the United States.

Preliminary Statement

Appellant's Jurisdictional Statement and Brief on this appeal raise a number of issues concerning the interpretation and application of the relevant Georgia statutes and the particular procedures followed in the trial court below. We reiterate NATO's position, stated in its brief *amicus curiae* in support of the Jurisdictional Statement, that it would be most unfortunate if this appeal were adjudicated on these issues which can have little significance outside the State of Georgia or the particular facts of this case. Rather, we urge the Court to resolve the following issues which are squarely presented by the record below, are of vital constitutional significance, and will have an important impact on future obscenity prosecutions throughout the country.[2] Furthermore, unless they are promptly resolved, and the Court's decision in *Miller* clarified, there will be a severe chilling effect on First Amendment rights in the creation and distribution of motion pictures and literature.

1. Whether the film Carnal Knowledge is obscene and hence devoid of constitutional protection (Point I).

2. Whether, even in the short time since they were promulgated, the standards enunciated in *Miller* to separate obscenity from constitutionally protected material have been so demonstrably misinterpreted by lower courts and so ineffective in providing clear and consistent guidelines, that they should be clarified to express the Court's views in a more meaningful way (Point II).

[2] All of the issues raised on this appeal from a state court are constitutional. In these circumstances, it is appropriate for the Court to adjudicate those of particular significance. *See Street* v. *New York*, 394 U.S. 576 (1969).

3. Whether the *Miller* standards should be clarified by adding a fourth criterion that material is not obscene unless, taken as a whole, it is patent and obvious hard core pornography (Point III).

4. Whether the *Miller* standards should be clarified by eliminating "serious" from the third criterion and providing that a work is obscene only if, taken as a whole, it lacks any literary, artistic, political or scientific value (Point IV).

5. Whether *Miller* authorizes the more than 78,000 local political and judicial subdivisions throughout this country each to apply its individual community standards in determining whether a work appeals to the prurient interest or is patently offensive, or whether state-wide standards are constitutionally required (Point V).

6. Whether *Miller* requires a single, national standard to determine whether a work has literary, artistic, political or scientific value (Point V).

The decision of the Georgia Supreme Court below is so at war with the principles of *Miller* as to require not only reversal, but a clarification of the *Miller* standards themselves. Such a gross misapplication by the highest court of a state must raise serious questions about the clarity and effectiveness as guidelines of the standards themselves. Moreover, as construed by the Georgia Court to strike down a picture so obviously not obscene as Carnal Knowledge, *Miller* provides local prosecutors with a roving commission to stamp out almost any work that offends their particular sensibilities.

Unless the Court takes this opportunity to elaborate and refine the *Miller* standards, prosecutors, juries, lower courts and those conscientiously trying to follow the law will have no reasonable understanding of the difference between protected First Amendment expression and criminal acts, and the right to free speech in this area will become hostage to unbridled prosecutorial discretion and uncertain judicial result.

Facts

Avco Embassy Pictures Corporation, the distributor, pursuant to a contract with Mike Nichols,[3] the producer-director, purchased the rights to an original screenplay of Carnal Knowledge in November, 1969. The author of the screenplay was Jules Feiffer, a well-known satirist and playright. Mr. Nichols cast Jack Nicholson, Art Garfunkle, Ann-Margret and Candice Bergen, all nationally-renowned, highly successful actors and actresses, in the leading roles. Ann-Margret received an Academy Award nomination for her performance in the movie.

The picture opened in June, 1971, 20 months after purchase of the screenplay. Production costs ran to approximately $5,400,000. In addition, marketing and distribution costs were approximately $3,400,000, as of December 31, 1973.

Carnal Knowledge played in 4,995 theatres, in every state of the Union, including large cities, suburbs, towns and rural areas. It played in other small Georgia communities in addition to Albany such as Camilla, Cordale, Valdosta, Douglas, Fitzgerald, Milledgeville, Dalton, Rome and Carlton. Approximately 17,500,000 persons saw the movie in the United States.[4]

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[3] Mr. Nichols has directed other major films, such as Who's Afraid of Virginia Wolff, The Graduate, Catch 22, and The Day of the Dolphin. While the factual material contained in this section of the brief is not in the record, it comes mostly from public sources such as trade journals and financial reports, and is not controverted. Therefore, the Court may take judicial notice of it. *See Granville-Smith* v. *Granville-Smith*, 349 U.S. 1, 14 (1955); *W. A. Mack, Inc.* v. *General Motors Corp.*, 260 F.2d 886, 889-90 (7th Cir. 1958); *United States* v. *An Easement and Right of Way Over Two Tracts of Land*, 246 F. Supp. 263 (W.D. Ky. 1965), *aff'd.*, 375 F.2d 120 (6th Cir. 1967).

[4] Avco Embassy reported total license fees from United States distribution at $12,373,000. We estimate, based on average industry figures, that the distributor's license fees constituted 35 percent of box office admissions and that each viewer paid, on the average, $2 for admission. Thus, approximately 17,500,000 people paid approximately $35,000,000 in box office fees to see Carnal Knowledge.

Carnal Knowledge was one of the most widely acclaimed films of recent years, appearing on many "ten best" lists for 1971, and was the subject of scores of highly complimentary reviews.[5]

Up to the time Appellant showed the movie in Albany it had not been held obscene any place. So far as we are aware, the present case is the only instance in which the film has been held obscene.[6]

Despite these impressive credentials, which would have given any theatre owner strong assurance that he was engaging in constitutionally protected activity when he showed the movie, Appellant was arrested and convicted of violating Georgia statutes which provide for a maximum sentence of one year imprisonment or fine of $1000 or both. Ga. Code Ann., § 27-2506 (1972). Appellant was in fact sentenced to 12 months probation and fined $750.

The only evidence introduced at trial by the prosecution was the film itself. There was no expert testimony, or indeed testimony of any kind, as to whether the film, taken as a whole, had serious literary, artistic or political value.

On appeal, the Georgia Supreme Court affirmed Appellant's conviction by a four to three vote, holding, *inter alia*, that Carnal Knowledge was obscene within the meaning of the standards enunciated by this Court in *Miller*, and that the trial judge correctly charged the jury to apply a "community standard," by which he meant the local standard of Dougherty County, Georgia, in determining

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[5] Some of these reviews are referred to in the dissenting opinion of Justice Gunter below, 230 Ga. at —, 199 S.E.2d at 186 and in Appellant's brief on this appeal.

[6] Indeed, as Appellant's brief points out, it appears to have been challenged in only a handful of instances, all unsuccessfully.

whether this Court's obscenity standards were met by this picture.[1] *Jenkins* v. *Georgia*, 230 Ga. 726, 199 S.E.2d 183 (1973).

This Appeal followed, and the Court noted probable jurisdiction. 42 U.S.L. Week 3351 (U.S. Dec. 11, 1973).

POINT I

Carnal Knowledge is not obscene under *Miller*.

This Court in *Miller* established the following standard to determine whether material is obscene and hence not protected by the First Amendment:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24 (citations omitted).

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[1] The trial judge instructed the jury to apply a "community standard" and the Georgia Supreme Court clearly understood this to refer to the local community in Dougherty County, Georgia, rather than the state as a whole. Thus Justice Jordan's majority opinion interpreted *Miller* as authorizing "state or local community standards in lieu of 'national standards'." 230 Ga. at — , 199 S.E.2d at 184. This shows that the Georgia Court considered a "local" standard to encompass a smaller area than a "state" standard. Furthermore, Justice Gunter's dissent states that the majority was referring to "this 'local community'" as meaning Dougherty County, 230 Ga. at —, 199 S.E.2d at 185, and Justice Hawes' dissent specifically points out that the majority approved "small towns and hamlets as being the 'community' from which the standard for obscenity is drawn . . ." 230 Ga. at — , 199 S.E. 2d at 189.

As a matter of constitutional fact, a simple viewing of Carnal Knowledge makes it abundantly clear that it does not meet any of the three criteria of the *Miller* test.[8]

(a) Carnal Knowledge, taken as a whole, does not appeal to the prurient interest.

An appeal to the prurient interest means "a shameful or morbid interest in nudity, sex, or excretion," and "lewd" and "lascivious." *Roth* v. *United States*, 354 U.S. 476, 487 n. 20 (1957).

This film simply does not meet such a test. It does not contain even a single explicit portrayal of an ultimate sexual act or of genitals. It is an artistic work of distinction and sensitivity. The direction, acting and photography are of the highest quality that the American motion picture industry can produce. The story is about the pressures and problems faced by two upper-middle class Amherst College graduates as they grow up, attaining success in their professional careers, but failure in their personal lives. In illuminating their inability to develop stable and satisfying relationships, and ultimately their boredom and loneliness, the film deals with the human predicament. While part of this predicament is that sex by itself is not a

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[8] It is, of course, squarely within this Court's province to determine whether Carnal Knowledge is in fact obscene under the relevant constitutional standards since "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954). Chief Justice Burger, writing for the Court in *Miller*, made it clear that this Court would continue to exercise its "ultimate power" "to conduct an independent review of constitutional claims when necessary", 413 U.S. at 25, and approvingly quoted from Mr. Justice Harlan's dissent in *Roth* v. *United States*, 354 U.S. 476, 498 (1957): "Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.'" 413 U.S. at 29-30. *See also Jacobellis* v. *Ohio*, 378 U.S. 184 (1964); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

substitute for meaningful relationships and hence does not provide fulfillment, no finder of fact could reasonably conclude that the film, taken as a whole, appeals to the prurient interest.

First of all, as this Court made clear in *Roth*, sex and prurience are not synonymous:

> "The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth* v. *United States, supra,* 354 U.S. at 487. [footnotes omitted]

Sex is treated in this film as a vital but sometimes baffling and exasperating part of life, but without lewdness or lascivity. While the leading male characters are preoccupied with sex, the picture is not; it deals with them as immature and troubled personalities unable to cope with the world around them.

Second, the great bulk of the picture does not depict sexual acts in any way, and where they are portrayed, it is done discreetly, obliquely, only suggestively, and as a natural, illustrative aspect of the theme. Thus "the dominant theme of the material taken as a whole," *Memoirs* v. *Massachusetts,* 383 U.S. 413, 418 (1966), does not appeal to the prurient interest.

(b) Carnal Knowledge does not depict sexual conduct in a patently offensive way.

Even those brief parts of the film which are concerned with sexual acts cannot be held patently offensive within the meaning of the second criterion of the *Miller* standards. For they plainly do not go "substantially beyond customary limits of candor in description or representation of

such matters," *Jacobellis* v. *Ohio*, 378 U.S. 184, 191 (1964); nor are they "portrayed in a manner so offensive as to make it unacceptable under current community mores," *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482 (1962).

Carnal Knowledge cannot, by any standard, be put in the same category as the kind of material considered by this Court to be patently offensive.[9] It is tame stuff indeed compared to the material at issue in the cases decided by this Court in the recent past.[10] The sexual acts are only suggested, never explicitly depicted, and there is no showing of the genitals in those scenes suggesting sexual activity.

Surely Carnal Knowledge, which has played to an estimated 17,500,000 people, in every state, indeed in practically every village and hamlet in America, almost without

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[9] As Justice Hawes pointed out dissenting below: "Certainly, the film under consideration here is not the kind of hard-core pornography we removed from public consumption in [*Slaton*]." *Jenkins* v. *Georgia*, 230 Ga. 726, —, 199 S.E. 2d 183, 190 (1973) (Hawes, J., dissenting.)

[10] For example, *Miller* dealt with brochures advertising four books —Intercourse, Man-Woman, Sex Orgies Illustrated, An Illustrated History of Pornography—and a film entitled Marital Intercourse. The Court found, "[P]rimarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." 413 U.S. at 18. *Slaton* dealt with two pictures depicting "scenes of simulated fellatio, cunnilingus, and group sex intercourse." 413 U.S. at 52. The book in question in *Kaplan* v. *California*, 413 U.S. 115 (1973), "Suite 69" is, according to the Court's characterization, "made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous; there is only the most tenuous 'plot.' Almost every conceivable variety of sexual contact, homosexual and heterosexual, is described. Whether one samples every fifth, 10th or 20th page, beginning at any point or page at random, the content is unvarying." *Id.* at 117.

incident, cannot be found to go substantially beyond customary limits of candor. To affirm a fact-finder's holding otherwise would mean that juries and judges could completely exclude any and all photographic suggestions—not merely specific close-ups—of sexual activities from films. In light of *Roth's* pointed comments that "sex and obscenity are not synonymous" and that "[t]he portrayal of sex . . . is not itself sufficient reason to deny . . . constitutional protection." 354 U.S. at 487, upholding the Georgia courts on this issue would mark a sharp, unwarranted break with precedent. *See also Jacobellis* v. *Ohio*, 378 U.S. 184, 196 (1964) (holding the movie, The Lovers, not obscene notwithstanding "an explicit love scene in the last reel of the film").

(c) Carnal Knowledge, taken as a whole, does not lack serious literary, artistic, political or scientific value.

It is inconceivable that a movie such as this—which many critics found to be one of the ten best of the year; which had a star nominated for an Academy Award; and which scores of reviewers[11] analyzed on a sophisticated level, debating the ideas and values which it contained—could be found to be without serious literary, artistic or political value. An independent viewing of the picture must certainly convince the Court that all these critics are not fantasizing; on the contrary, such a viewing will persuade the Court that the picture does indeed present ideas and provocative comments about the nature of life. This is simply not the kind of picture where the viewer's thought processes are monopolized by constant and repetitive bombardment of explicit or simulated sex so that the communication of ideas and values is nonexistent. Instead,

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[11] A sampling of the reviews and critiques are cited in Appellant's brief.

this is a major artistic work in which the very limited amount of sex portrayed is an integral part of the overall theme. Where, as here, the sex portrayed is incidental to the story, and not vice versa, the work should be protected under the First Amendment.

POINT II

This case demonstrates that the *Miller* standards need to be clarified.

This Court has consistently recognized the necessity of establishing standards for determining obscenity which will provide clear and predictable guidelines that do not chill or impinge upon First Amendment rights. There are obviously "inherent dangers of undertaking to regulate any form of expression," *Miller* v. *California, supra,* 413 U.S. at 23, because "freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963).

Most state criminal obscenity statutes, as a practical matter, have this Court's changing definitions of obscenity incorporated into their definitions of prohibited activity. Thus in most states, and under many federal criminal statutes outlawing obscenity,[12] the dissemination of material which is obscene under the Court's standards is ipso *facto* a crime. When the Court promulgates obscenity standards, while it formally purports only to draw the outside line to which state regulation can reach, in practical effect it draws a vitally important line separating the

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[12] *See, e.g.,* 18 U.S.C. § 1461 (1970) (use of mails); 18 U.S.C. § 1462 (1970) (importation); 18 U.S.C. § 1463 (1970) (use of obscene mailing wrappers); 18 U.S.C. § 1465 (1970) (transportation in interstate commerce for sale and distribution).

exercise of First Amendment rights from criminal activity, one which the Court has acknowledged can all too easily become "a dim and uncertain line," *Bantam Books, Inc.* v. *Sullivan, supra,* 372 U.S. at 66.

It is imperative that this line be as clear and precise as possible for the reasons articulated in Mr. Justice Brennan's dissenting opinion in *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 83-93.

First, a vague standard does not warn those conscientiously trying to obey the law what is prohibited activity. It has long been recognized as unconscionable for government to force its citizens to guess at what may or may not be a crime. *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939); *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926). The predicament of Appellant in the instant case demonstrates the danger. He has been convicted of a crime, fined and given a year's suspended sentence, for showing a movie which had previously played all over the United States and the State of Georgia, and he will not finally know whether his actions in February, 1972 were criminal or an exercise of free speech until this Court finally renders its decision. It is essential, we suggest, that the Court in this case articulate a rule which will prevent others from being put in the same position in the future.

Second, imprecise language in a criminal standard provides an unacceptable leeway for prosecutors and police officials to engage in arbitrary, even discriminatory, enforcement of the law based on unrevealed personal interests and biases. Particularly when this threatens First Amendment rights, the Court has been vigilant in preventing even the potential for such abuse by demanding precision. As the Court said in *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-09 (1972), "A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applica-

tion." See also *Gregory* v. *City of Chicago*, 394 U.S. 111, 120 (Black, J., concurring). It is tempting to speculate why this film was prosecuted in Albany and not Camilla, Valdosta or Fitzgerald, Georgia or the hundreds of other towns it played in that are similar to Albany.

Third, lack of clarity will inescapably have a "chilling" or deterrent effect on the lawful exercise of free speech. Many authors, directors, producers, distributors, exhibitors and booksellers, understandably concerned for their own personal or economic welfare, will simply not approach the zone of uncertainty if the penalty for guessing wrong is a criminal sentence. "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford, supra,* 408 U.S. at 109 (footnote and citations omitted). And this Court, mindful of the constitutional imperative of open and robust debate on all issues of the day, has rightfully stressed the importance of preventing such a chilling effect by requiring clarity and precision in regulating speech. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell* v. *Connecticut,* 310 U.S. 296, 311." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963). Where such specificity is lacking, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965).

Carnal Knowledge took 20 months to produce and cost the distributor for production and marketing approximately $8,800,000. No company, in making artistic decisions during the production of such a film, could afford to approach an imprecise line demarking criminality because a wrong prediction would result in tremendous financial losses. Of course, exhibitors threatened with fines

and imprisonment would be even more unwilling to show a picture with uncertain constitutional protection.

For all these reasons the Court has invariably demanded that "sensitive tools" be used to carry out the "separation of legitimate from illegitimate use of speech." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), *quoted in Paris Adult Theatre I* v. *Slaton, supra*, 413 U.S. at 79 (Brennan, J., dissenting.)

There was a basic disagreement within the Court in *Miller* and *Slaton* as to whether the Court's obscenity standards were clear enough to avoid these dangers. The dissenting Justices in *Slaton* concluded that "we have been unable to provide 'sensitive tools' to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into suppression of the latter," 413 U.S. at 79, (Brennan, J. dissenting). But the majority in *Miller* concluded that the fact that "for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines . . . [means that the Court can] provide positive guidance to the federal and state courts alike", 413 U.S. at 29.

Decisions, even in the short time since *Miller*, have demonstrated that the majority was unduly optimistic in thinking they were providing clear guidance just because they agreed on the same standard. In the event, that standard has proved too vague and imprecise to communicate the Court's intentions or provide reasonable predictability of meaning. The incredible decision by the Supreme Court of Georgia purporting to apply the *Miller* standards in this case makes clear that the existing three prong test is insufficient. Unfortunately, this case is not an isolated aberration. Last Tango in Paris, a motion pic-

ture of comparable taste and distinction,[13] has been held obscene under *Miller*[14] and harassed by local prosecutors relying on the *Miller* standards in many parts of the country.[15]

It is apparent even from this short experience that the *Miller* standards do not provide consistent or meaningful

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[13] Reviewer Judith Crist noted on the "Today Show," February 2, 1973, that Last Tango in Paris while it did include scenes depicting sex and while it involved a primarily sexual relationship between the two principal characters "is not about sex, and it is not about inhumanity. And thanks to Marlon Brando's simply stunning performance, which gives the whole film an aura of greatness . . . it is about the things that a man lives by; and, essentially, its theme is that you cannot live in isolation by sex alone." The *New York Daily News* reviewer, Wanda Hale, said: "It took guts to play the libertine in 'The Last Tango in Paris' and Marlon Brandon gives a shattering portrayal of a sick man more to be pitied than condemned." (February 28, 1973, p. 68). Alan M. Kriegsman of *The Washington Post* commented: "The characters' drives may be expressed biologically, but that is by no means their entire essence. In fact, on the evidence of the film, the characters' motivation, as distinct from their appetites, is basically psychological and romantic, "Tango," in other words, is not about sex. It is about the possibility of communication, in particular, of emotional communion between people in a contemporary milieu. If Bertolucci was trying to "say" anything at all, it was about love, not eroticism. This means, for one thing, that there is no disparity between the romantic style of the film, with its Rembrandtian light and color, ornate decor, and gliding, spiralling camera movement on the one hand, and its affective content on the other." (June 3, 1970, § M, at 10).

[14] *Gulf States Theatres of Louisiana, Inc.* v. *Richardson*, unreported (1st Jud. Dist. Ct., Parish of Caddo) (Oct. 12, 1973), *rev'd on other grounds*, — La. —, 42 U.S.L. Week 2362, — So. 2nd — (Sup. Ct. Dec. 3, 1973).

[15] *See, e.g., United Artists Corporation* v. *Harris*, 363 F.Supp. 857 (W.D. Okla., 1973) and *United Artists Corporation* v. *Proskin*, 363 F.Supp. 406 (N.D.N.Y., 1973), (both involving threats of prosecution deferring exhibition of Last Tango in Paris). *See also Incorporated Village of Lynbrook* v. *United Artists Corp.*, 75 Misc. 2d 124, — N.Y.S. 2d — (Sup. Ct. 1973). Unfortunately, no citations record the countless threats and harassment of theatre owners which have sharply accelerated since *Miller*. In any instances, theatre owners, rather than incurring the risk and expense of resistance, simply bow to the pressure, and there is no record of these impingements on First Amendment rights.

guidelines to lower courts and will not be given a uniform or predictable application. Thus the dangers from a vague standard referred to above will not be avoided. Furthermore, the fact that state courts are holding Carnal Knowledge and Last Tango in Paris obscene establishes that the *Miller* guidelines are subject to grievous misinterpretation.

However, a solution to this dilemma may not necessarily require adoption of the dissenting position in *Slaton*.[18] Indeed, experience since Miller may show how the standards can be modified to give clearer guidance and certainty while preserving the substance of the *Miller* and *Slaton* holdings. Therefore, we urge this Court to clarify and elaborate the *Miller* standards, and we suggest appropriate ways to accomplish this in Points III and IV, *infra*.

POINT III

The *Miller* standards should be clarified to provide that only patent and obvious hard core pornography is unprotected by the First Amendment.

Although there is no specific reference to hard core pornography in the *Miller* standards themselves, the Court specifically stated that its purpose in establishing them was "to isolate 'hard core' pornography from expression protected by the First Amendment." 413 U.S. at 29. The Court further made clear that:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hard core' sexual conduct* specifically defined by the regulating state law as written or construed." 403 U.S. at 27. (Emphasis added.)

[18] NATO believes that as matters of wise policy and constitutional imperative, consenting adults should be free to view or to read whatever material they wish. Thus, we fully agree with Mr. Justice Brennan's dissenting opinion in *Slaton*. However, we do not pause to reargue the issue since the Court has considered it so recently.

There are five separate references to hard core pornography or sexual conduct in the Chief Justice's majority opinion in *Miller*,[17] and another in his opinion in *Slaton*.[18] It seems clear from this that the Court conceived the *Miller* standards to encompass what is commonly known as hard core pornography.

However, the Georgia Supreme Court did not perceive this from its reading of *Miller*. Although that Court specifically held in *Slaton* that the films at issue were "hard core pornography", *Paris Adult Theatre I* v. *Slaton* 228 Ga. 343, 347; 185 S.E. 2d 768, 770 (1971), it made no such finding as to Carnal Knowledge in this case. Of course, Carnal Knowledge is obviously not hard core pornography, as pointed out by Justice Hawes in his dissent below. 230 Ga. at —, 199 S.E. 2d at 190.

We believe the explicit incorporation of the test of hard core pornography into the Court's obscenity standards would not only prevent future decisions such as the one below, but would also faithfully reflect the development of the law culminating in *Miller* and add substantial clarity, meaning and predictability to the standards. As various Justices of this Court have recognized, the term "hard core pornography" has meaningful and consistent content to laymen and judges alike. To paraphrase Mr. Justice Stewart, "people know it when they see it." *See Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Put another way, beyond its denotative definition, the phrase has clear connotative meaning which the three criteria of the *Miller* standard simply do not possess.

Mr. Justice Stewart has elsewhere pointed out that the phrase hard core pornography encompasses a "distinct and easily definable class of material." *Ginzburg* v. *U.S.* 383

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[17] 413 U.S. at 27; 413 U.S. at 29; 413 U.S. at 35; 413 U.S. at 36; *ibid.*

[18] 413 U.S. at 52.

U.S. 463, 499 (1966). *See also Mishkin* v. *New York*, 383 U.S. 502, 518 (1966) (Stewart, *J.*, dissenting).

Similarly, Mr. Justice Harlan recognized that hard core pornography isolates a "narrow class" of material which is capable of reasonably precise definition, *Ginzburg* v. *United States, supra*, 383 U.S. at 493 (Harlan, J., dissenting), and that "it does describe something that most judges and others will 'know . . . when [they] see it' . . . [citation omitted] and that leaves the smallest room for disagreement between those of varying tastes." *Memoirs* v. *Massachusetts, supra*, 383 U.S. at 457 (1966) (Harlan, J., dissenting). Thus he concluded that federal obscenity legislation should be restricted to "hard core pornography". *Ibid.* See also *Roth* v. *United States, supra*, 354 U.S. at 507 (Harlan, J., dissenting).

This concept was put succinctly by the Court in *Slaton*, 413 U.S. at 56, n.6, *quoting United States* v. *Wild*, 422 F.2d 34, 36 (2nd Cir. 1969), *cert. denied* 402 U.S. 986 (1971): "Simply stated, hard core pornography . . . can and does speak for itself." The examples of what a state statute could define as patently offensive sexual conduct given by the Court in *Miller*, 413 U.S. at 25, are the same kind of material which, if pervading and dominating a work, would constitute hard core pornography. *See United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 130, n.7 (1973).

Furthermore, the Court has demonstrated that it can communicate on paper the essence of what is hard core pornography. Readers of the Court's opinions, we believe, understand hard core pornography to be mind-numbing repetitive filth of the kind at issue in *Miller, Slaton* and *Kaplan* v. *California*. It is material so dominated by explicit, lewd portrayals of sex and sex-related acts that it is substantially incapable of inducing rational thought or constituting the communication of ideas.

The description of this class of material, contained in Mr. Justice Stewart's dissenting opinion in *Ginzburg*, quoting from a description in the Solicitor General's brief of the kind of material which constitutes the great bulk of matter proceeded against under the federal obscenity laws, gives an easily understandable picture of the kind of material which constitutes hard core pornography:

> ". . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment . . ." 383 U.S. at 499, n.3.

This seems to be what the Court had in mind when it said that the goal of the *Miller* standards was to "isolate 'hard core' pornography from expression protected by the First Amendment". 413 U.S. at 29. However, as shown in Point II, *supra*, lower courts and prosecutors are not getting the message. Thus, we suggest that the Court, without changing the substance of *Miller* or *Slaton*,[19] make explicit

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[19] In *Mishkin* v. *New York*, *supra*, 383 U.S. at 508, Mr. Justice Brennan suggested in dicta that hard core pornography was a different standard than the standard set out in *Roth*. Since that time, however, the Court has recognized that the *Roth* standard as elaborated in *Memoirs* v. *Massachusetts*, *supra*, 383 U.S. at 418 is "not dissimilar" from the "distinct and clearly identifiable class of material" connoted by the term had core pornography. *Redrup* v. *New York*, 386 U.S. 767, 770 (1967) (per curiam). And as explained above, *Miller* does not appear to depart from *Redrup* to the extent that *Redrup* suggests that hard core pornography is a distinct, well-understood way of describing the kind of material unprotected by the First Amendment.

what is implicit in these opinions by adding a fourth criterion to the current standards: material is protected unless, taken as a whole, it is patent and obvious hard core pornography. This would greatly clarify *Miller* and prevent other courts from going astray as did the Supreme Court of Georgia in this case.

Adding this fourth hard core pornography criterion to the Court's obscenity standard would be fully consistent with the basic thrust of the Court's obscenity holdings. The essense of *Roth* is that "ideas having even the slightest redeeming social importance" have the full protection of the First Amendment, and obscenity is not protected for the very reason that it is "no essential part of any exposition of ideas." 354 U.S. at 484-485, *quoted in Miller,* 413 U.S. at 20. *Roth,* of course, relied heavily on *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), which held that "fighting words" are not protected by the First Amendment because they "are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit derived from them is clearly outweighed by the social interest in order and morality. . . ." *Id.* at 572, *quoted in Roth,* 354 U.S. at 484-85.

Obscenity should be defined consistent with this constitutional genesis to include only material which, like fighting words, generates immediate emotional reaction or stupefaction and is not capable of stimulating reason, thought or debate. Hard core pornography, consisting of repetitive and continuous bombardment of the senses with explicit, lewd sexual acts, unrelated to ideas, fits within this class of worthless material. Expression that does not so bombard the senses, and is capable of inducing reflection and debate, should be given First Amendment protection consistent with *Chaplinsky* and *Roth.* Furthermore, all of the materials held obscene and hence constitutionally

unprotected by this Court since *Roth* were patent and obvious hard core pornography.[20]

Thus, defining obscenity as hard core pornography would weave a standard from the consistent thread running through the Court's opinions from *Roth* to *Miller* and, by providing a reasonably meaningful and predictable guideline, would minimize the difficulties with the present *Miller* standards discussed in Point II, *supra*, and articulated in Mr. Justice Brennan's dissenting opinion in *Slaton*.

A number of state courts have already made clear that the phrase hard core pornography is meaningful to them and to the prosecutors and jurors whom they supervise. These courts have interpreted their state statutes and this Court's obscenity standards as equivalent to hard core pornography for the very reason that they know what that phrase means. For example, in *People* v. *Heller*, 33 N.Y. 2d—, — N.E. 2d—(Case No. 71-184, 1973), the New York Court of Appeals recently upheld one of that State's obscenity statutes as not void for vagueness and as meeting the *Miller* requirement that sexual conduct in material challenged as obscene be specifically defined. The New York courts had interpreted the statute as applying only to hard core pornography and, the Court reasoned, that was a well-understood concept. Thus the Court inter-

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[20] See n. 10, *supra*; *Huffman* v. *United States*, 470 F.2d 386, 396-402 (D.C. Cir. 1971) (an elaborate case by case discussion of the materials involved in the Court's obscenity decisions); *People* v. *Mature Enterprises, Inc.*,—N.Y.S. 2d—, — & n. —, 343 N.Y.S. 2d 911, 922 & n. 11 (N.Y. City Crim. Ct., 1973) (review of recent, pre-*Miller per curiam* decisions of this Court.) See also *People* v. *Noroff*, 67 Cal. 2nd 791, 433 P. 2nd 479 (1967). The only possible exception is *Ginzburg* v. *United States*, *supra*, where the Court recognized that the material in question might not be obscene if distributed in a different manner.

preted the typically worded obscenity statute:[21] "as pertaining to hard core pornography and the average man, whether he be the smut peddler or the policeman, knows it when he sees it." Slip op., at 13; *see also id.*, at 16. It pointed out that it had "applied the hard core pornography test with consistency, *id.*, at 12, and that this gave the generally worded statute a "narrow application." *Id.*, at 13. The Court also clearly equated hard core pornography with "exactly that sort of thing described in the *Miller* opinion." *Id.*, at 13.

The experience of the New York Court of Appeals in applying a hard core pornography standard shows that the phrase has consistent and well-understood meaning. Thus, Judge Fuld, writing for the Court in *People* v. *Richmond County News, Inc.*, 9 N.Y. 2d 578, 587, 175 N.E. 2d 681, 686 (1961), described hard core pornography in terms strikingly consistent with Mr. Justice Stewart's quotation from the Solicitor General's Brief in *Ginzburg*:[22]

> "It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Lawrence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty.' "

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[21] The New York statute defined "obscene" as follows: "Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value." N.Y. Penal Law, § 235.00(1) (McKinney 1967).

[22] See p. 20, *supra*.

People v. *Mature Enterprises, Inc.*, — Misc.2d —, 343 N.Y.S. 2d 911 (N.Y. City Crim. Ct. 1973), is a recent example of how the hard core pornography test has proved an effective and easily applicable guideline for New York courts to judge obscenity cases. The Court had no trouble holding the motion picture Deep Throat obscene because "it is readily recognized throughout the nation by all those not beyond the pale . . . as unmistakable hard core pornography." *Id.*, at 920. The Court concluded, after a careful review of recent obscenity cases, that the phrase hard core pornography is "readily definable and certainly more readily identifiable as a reasonable precise concept" than any other standard. *Id.*, at 919. Finally, the court concluded that the United States Supreme Court "has equated obscenity with hard core pornography without expressly saying so . . ." *Id.*, at 918.

Other state courts have frequently equated obscenity with hard core pornography, recognizing that the phrase has a connotative meaning that the Court's shifting definitions simply do not have. Indeed, many courts viewed the meaning of hard core pornography as so clear that it was not necessary to define it. The California Supreme Court in 1967, for example, carefully compared the material before it with the kind of material that the Supreme Court had found obscene. In concluding that a nudist magazine which did not depict sexual activity was not obscene, the Court noted that "the graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene . . . Such materials, and no others, have been thought to constitute 'hard-core pornography'." *People* v. *Noroff*, 67 Cal. 2d 791, 794, n.6, 433 P.2d 479, 481 n.6 (1967). In *Commonwealth* v. *Dell Publications Inc.*, 427 Pa. 189, 233 A.2d 840 (1967), the Pennsylvania Supreme Court in holding Candy not obscene reasoned that it was not hard core pornography which one knows when he sees it. 427 Pa. at 212, 233 A.2d at 853.

Federal courts too have concluded that this phrase constitutes a clear and effective guidepost for obscenity regulation. Thus, in *United States* v. *Hamling*, 481 F.2d 307 (1973), *cert. granted*, 42 U.S.L. Week 3405 (U.S. Jan. 14, 1974), the Ninth Circuit upheld a conviction under 18 U.S.C. § 1461 (1970) because it found the material at issue to be "hard core pornography," "unmistakably hard core pornography," and "hard core pornography with a vengeance." *Id.* at 317. This Court has assigned *Hamling* for argument along with *Jenkins*. These two cases seem to illustrate where a hard core pornography test will draw the line. Any layman or jurist would immediately conclude that the advertising brochure found obscene in *Hamling* is hard core pornography and that Carnal Knowledge is not hard core pornography. As pointed out at p. 18, *supra*, even the majority of the Georgia Supreme Court did not consider Carnal Knowledge hard core pornography.

In *United States* v. *Wild*, 422 F.2d 34 (2d Cir. 1969) *cert. denied*, 402 U.S. 986 (1971), the Second Circuit faced the issue whether expert testimony was required in a prosecution under 18 USC § 1461 (1970). It held that such testimony was not required for the significant reason that obscenity meant hard core pornography and that term was understood by laymen without the need of expert testimony. Chief Judge Lumbard, speaking for the court, said, "Simply stated, hard core pornography . . . can and does speak for itself." 422 F.2d at 36. See also *Luros* v. *United States*, 389 F.2d 200, 205 (8th Cir. 1968).

While a hard core pornography test would give fair warning as to what can be prosecuted, it would not prevent effective regulation where government desires it. States could outlaw the very kind of disgusting filth that people find objectionable and prosecutors would not be placed in the unenviable position of having to prove an extreme negative such as "utterly without redeeming social value." It would prevent frivolous prosecutions such as the

present one, clear the way for successful prosecutions in meritorious cases, and be faithful to the principles of *Miller* and *Slaton*.

POINT IV

The *Miller* standards should be clarified to provide that material which has any literary, artistic, political or scientific value is constitutionally protected.

The Georgia Supreme Court, incredibly, held that Carnal Knowledge, taken as a whole, lacked serious literary, artistic, political or scientific value as those words are used in *Miller*. The most cursory viewing of this high quality, critically acclaimed, award winning film demonstrates that the Georgia court did not understand the meaning of these words intended by the Court.[23] Unfortunately, the frequency of local prosecution and harassment of such other artistic but controversial pictures as Last Tango in Paris[24] indicate that such misinterpretations are not uncommon and will continue unless this Court clarifies the *Miller* standards.

We suggest that the trouble with the third criterion of the *Miller* standard lies in the word "serious." It has no clear or consistent meaning, particularly when referring to such concepts amorphous and controversial in themselves as literature, art, politics and science. Inserting such a qualitative word in the obscenity standards leaves the trier of fact totally at sea and encourages him to insert his own personal tastes and prejudices into the decision-making process. This is a particularly dangerous possibility when one considers that much material prosecuted under criminal obscenity statutes is not familiar or comfortable to most judges and jurors.

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[23] See pp. 8, 11-12, *supra*.

[24] See pp. 15-17, *supra*.

It is difficult enough to determine whether material has literary, artistic, political or scientific value; it seems impossible to determine by any consistent standard whether such value is serious or not serious. As pointed out by Mr. Justice Douglas, concurring in *Memoirs* v. *Massachusetts*:

> "We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens." 383 U.S. at 427.

It is hard to understand how a judge or juror could determine whether material has "serious" literary, artistic, political or scientific value without guiding testimony by experts in the field. But the Court has stated that such expert testimony is not constitutionally required to make out a case of obscenity. *Kaplan* v. *California, supra,* 413 U.S. at 121; *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 56.[25] It may be possible that a juror can reflect the impact of material on the average person in his community without expert guidance in evaluating prurient interest or patent offensiveness.[26]. However, the reaction or level of tolerance of the mythical average person is irrelevant in assessing the seriousness of literary, artistic, political or scientific value. That turns on the inherent quality of the work itself. How, for example, can jurors without expert guidance determine whether Ulysses, Lady Chatterley's Lover or Fanny Hill has serious literary value,

[25] We urge the Court to reconsider these statements and hold that the free speech and due process clauses require expert testimony as to value; otherwise a conviction would not be supported by evidence as required by *Thompson* v. *Louisville*, 362 U.S. 199 (1960). *See also Vachon* v. *New Hampshire*, 42 U.S.L. Week 3403 (U.S. Jan. 14, 1974) (per curiam); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969).

[26] Even here, since material must be judged by contemporary community standards, one would think there must be evidence presented as to what those standards are in order to satisfy the due process clause.

or whether Masters and Johnson or Kinsey have serious scientific value.

The Court in *Miller* carefully explained that it rejected the "utterly without redeeming social value" test of *Memoirs* v. *Massachusetts* because that test never commanded a majority of the Court, placed a virtually impossible burden on the prosecution, and contained the too ambiguous concept of social importance. 413 U.S. at 22-23. However, the Court never explained why it adopted the requirement that material not only have value, but "serious" value, to be constitutionally protected. That word came like Venus full-blown out of the sea. None of the Court's reasons for rejecting the "utterly without redeeming social value" test justify requiring that only works of serious value be protected. That is in essence saying that small, unimportant ideas (i.e. non-serious ideas) are not protected. But *Chaplinsky*, *Roth* and its progeny hold that "all ideas" have the "full protection" of the First Amendment.

We urge, therefore, that the Court clarify the third criterion of its *Miller* standard—by eliminating "serious" —to provide that a work is obscene only if, taken as a whole, it lacks literary, artistic, political or scientific value.

POINT V

Under *Miller*, state-wide community standards should be applied to determine prurience and patent offensiveness, and a national standard applied to determine value.

In *Miller*, the California courts had used the "contemporary community standards of the State of California" to adjudicate the prurient appeal and patent offensiveness of the material in question. See 413 U.S. at 31. This Court

specifically upheld the use of this state-wide standard with respect to these two criteria of the obscenity test. There has been much confusion following *Miller* whether state courts and legislatures must apply state-wide standards for these two prongs or can instead allow the myriad communities within a state to apply their own local standards.[27] There is also confusion whether a local standard is permissable to determine the value of material, or whether a work's inherent worth cannot vary from state to state and thus must be judged by a national standard.

In the instant case, the Georgia Supreme Court applied a local county-wide community standard, apparently for all three criteria of the *Miller* test, with the anomalous result that Carnal Knowledge has been found obscene by the local standard of Dougherty County, although it has been shown—with apparent constitutional protection—in many other Georgia counties.

The issue whether the Constitution requires a national or state-wide standard in determining prurience and patent offensiveness has previously been debated by this Court,[28] culminating in the holding in *Miller* approving a state-wide standard. However, so far as we are aware, the Court's attention has not been focused on the serious dis-

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[27] Compare, *e.g.*, *State* v. *J.-R Distributors, Inc.*, —Wash.2d—, 512 P.2d 1049, 1065 (1973); *People* v. *Heller*, 33 N.Y.2d—, —N.E. 2d— (Case No. 71-184, 1973) (statewide standard required) with *Rhodes* v. *State*, 283 So. 2nd 351 (Sup. Ct. Fla. 1973); *Bruzelton* v. *State*, 50 Ala. App. 723, 282 So. 2d 342 (Crim. App. 1973) (local community standards permissible). See also *Richards* v. *State*, 497 S.W.2d 770, 777 (Tex. Civ. App. 1973) (both statewide and local community standards should be applied).

[28] See *e.g. Jacobellis* v. *Ohio, supra*, 378 U.S. at 192 (opinion of Justices Brennan and Goldberg advocating national standard); *id.* at 200 (Warren, C. J., dissenting, advocating less than a national standard).

order, uncertainty and unfairness which would result if it authorized local political or judicial subdivisions within a state to apply their own separate community standards.

There are over 78,200 separate political subdivisions in the 50 states of the United States.[29] New York State alone has 62 counties, 62 cities, 932 towns and 556 incorporated villages,[30] each one, except for the five counties constituting New York City, with the power to enact and enforce criminal ordinances. N.Y. Mun. Home Rule Law, § 10(1)(a)(11)-(12) (McKinney Supp. 1973). Illinois has 102 counties, 1267 cities and villages and 1432 towns.[31] And similarly, under Illinois law, each municipality is empowered to enact and enforce criminal ordinances. Ill. Ann. Stat., ch. 24, § 11-1-1 (Smith-Hurd 1973). The figures in many other states are comparable.[32]

There are approximately 14,800 motion picture theatres operating in the United States today. They are undoubtedly scattered throughout almost all of these political subdivisions. Of course, in many states these subdivisions overlap; thus, a single theatre could be located within a number of different subdivisions, such as a county and a city, or a county, a township and a village.

It is obvious that if a state were permitted to do so by the Constitution, and chose to define its community standards by political subdivision, an impossible crazy-quilt of conflicting standards would result. Indeed, pictures

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[29] U.S. Dept. of Commerce, Statistical Abstract of the United States 1973, 412.

[30] New York Legislative Manual, 1188-89, 1209-40 (1970).

[31] U.S. Dept. of Commerce, Statistical Abstract of the United States 1973, 412.

[32] For example, California has 57 counties and 407 municipalities; Pennsylvania has 66 counties, 1012 municipalities and 1552 townships; Texas has 254 counties and 981 municipalities; and Georgia has 158 counties and 530 municipalities. *Ibid.*

shown in a theatre located in two or three different political subdivisions would be judged by different standards depending on which subdivision prosecuted the theatre owner.

It is, of course, possible that some states may choose, if constitutionally permitted, to define the appropriate community for these purposes by some demarcation other than political subdivision, such as judicial district. However, this would lead to equally uncertain and absurd results. Generally, judicial districts are not drawn to encompass homogeneous communities but rather for administrative convenience. Thus it would be a fallacy to suggest that there is any identifiable community within a judicial district, and it would be artificial and illusory to expect jurors drawn from different communities within that district to apply a district-wide community standard.

Furthermore, the standard to be applied by a federal district court in prosecutions for violations of federal obscenity statutes would almost necessarily be different from that applied by the state courts if a less than statewide standard is permissible. Federal judicial districts are in most instances not coterminus with state political subdivisions or state judicial districts. Thus if the federal district courts applied the community standards of their districts or divisions, *see United States* v. *Groner*, 479 F.2d 557 (5th Cir. 1973), *vacated and remanded*, 42 U.S.L. Week 3243 (U.S. Oct. 15, 1973), and if state courts applied community standards of some different geographic area, different standards would govern federal and state prosecution of the same material disseminated in the same place.[33] For example, a theatre owner showing a picture in Miami

[33] This need not be a problem if state courts are limited to state-wide standards since a federal court could then apply a community standard encompassing the state within which it sits and, of course, federal judicial districts do not cross state lines. The only way to insure federal-state consistency is to require statewide community standards for both.

could be prosecuted under a Florida obscenity statute in a state court of local jurisdiction whereby the picture in question would be judged by the standards of Miami or Dade County, *see* n.27 *infra*, and also prosecuted under federal statutes whereby the picture would be judged by the standards of the Southern District of Florida which includes 11 additional counties, including rural areas such as the Everglades. *See* 28 U.S.C. § 89(c) (1970). Likewise, a federal prosecution for showing an allegedly obscene movie in Fairfax, Virginia would not be governed by the standards of Fairfax County or the city of Fairfax—the standards which might govern if the prosecution were brought under state law—but rather by the community standard of the entire Eastern District of Virginia, encompassing 52 counties, many of which comprise sparsely populated rural communities. *See* 28 U.S.C. § 127(a) (1970).

It takes no great prescience to realize that such a balkanized application of the United States Constitution will inevitably destroy any pretense of a uniform system of criminal justice. Furthermore, it will seriously impinge upon First Amendment rights of free expression. For such balkanization will make it impossible for a person disseminating movies or written material to know in advance whether that act constitutes the exercise of First Amendment rights or the commission of a crime in any particular location. Indeed, even the fact that a specific book or motion picture has been held to be protected speech by one court can give no assurance that showing it will not be held a criminal act in another court a few miles away. This in turn will have a serious chilling effect.

As we noted at p. 5, *supra*, it took 20 months to produce Carnal Knowledge at a cost of $5,400,000. Inevitably producers of motion pictures will, given the economics of the industry, feel forced to make films of minimal offensiveness to assure them of safe passage in the most restrictive of local communities. With this much effort and money

at stake, it is inconceivable that a producer would even approach the point where his product might be held obscene by any local community's standards. Nor is it possible to make different versions of a picture to play in different locations, particularly when the number and variety of local communities is so vast. The same, of course, would be true for authors and publishers of written material.

Thus, with respect to determining whether material appeals to the prurient interest or is patently offensive we urge the court to hold that only state-wide standards can be applied under *Miller*.

The Court in *Miller* did not reach the question whether anything less than a national standard may be used to judge the value of material at issue. While it may be true that prurience and patent offensiveness will vary from state to state because they turn on the impact of material on the average member of a community, the literary, artistic, political and scientific value of material cannot so vary because that quality turns on the inherent qualities of the work itself. Ulysses and Lady Chatterley's Lover have undisputed literary worth regardless of the feelings they may arouse in any particular local community, *cf.*, *Roth* v. *United States, supra*, 354 U.S. at 506 (Harlan, *J.*, dissenting), and Carnal Knowledge cannot lose its artistic merit when it crosses the Dougherty County line. There is no justification for judging the value of a work by reference to state or local community standards; that judgment can only be made against the standards of our civilization as a whole.

The verdict of the Dougherty County jury in this case demonstrates that applying any parochial standard of value violates a fundamental concept of the First Amendment—that it protects free speech rights to communicate ideas wherever one may go in this nation, regardless of how unpopular they may be in any local community. In short, we have a national constitution.

Unless this aspect of *Miller* is clarified we will continue to see a distressing growth of criminal obscenity convictions obtained by local prosecutors because they do not accept standards of literary, artistic, political or scientific value recognized by the nation at large. Incongruously, many such prosecutions will be aimed at the finest and most innovative products of American artists and writers.

Conclusion

The decision of the Georgia Supreme Court should be reversed; the Court should hold that the dissemination of Carnal Knowledge is protected by the First Amendment as a matter of constitutional fact; that material is protected by the First Amendment unless, taken as a whole, it is patent and obvious hard core pornography and lacks any literary, artistic, political or scientific value (in addition to appealing to the prurient interest and being patently offensive); that prurience, patent offensiveness and hard core pornography should be judged by state-wide community standards; and that literary, artistic, political or scientific value should be judged by a national standard.

Respectfully submitted,

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